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Utah Supreme Court

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Recommended Citation

Brief of Respondent, *Ogden City v. Public Service Comm. Of Utah*, No. 7907 (Utah Supreme Court, 1953).
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In the Supreme Court of the State of Utah

OGDEN CITY, A Municipal Corpora-
tion,

Plaintiff,

vs.

PUBLIC SERVICE COMMISSION OF
UTAH, a body politic and UTAH
POWER & LIGHT COMPANY, a
corporation,

Defendants.

Case No.
7907

DEFENDANT PUBLIC SERVICE COMMISSION'S BRIEF

FILED

MAR 19 1953

Clerk, Supreme Court, Utah

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**DEFENDANT PUBLIC SERVICE
COMMISSION'S BRIEF**

STATEMENT OF FACTS

On March 14, 1951, the City Commission of Ogden City enacted an ordinance granting to Utah Power and Light Co. (Defendent herein) “* * * the right, privilege or franchise * * *” (R. 250) to operate an electric utility business in Ogden City. This same ordinance levied a charge upon the defendant company equal to 2% of its

gross revenue derived from doing business within the corporate limits of the city.

Prior to the enacting of this ordinance, the defendant company paid to Ogden City a sum equal to $\frac{3}{4}$ of 1% of the company's gross revenue derived from operating within the city limits plus certain free and reduced rate service (R. 251-2).

All of the parties hereto have characterized this levy as either a "license tax" or "franchise tax."

As pointed out in the plaintiff's brief, the P. S. C. U. in its case No. 3780 after a hearing upon defendant company's application for a rate increase, heard in May and June, 1952, ordered the company to collect this 2% levy from "its customers in any municipality wherein is imposed any municipal franchise, occupation, sales or license tax."

There is no substantial question of fact in this case. This case is not concerned with the imposition of municipal levies nor with the obligation or duty of the company to discharge such levies. This case is directly and necessarily concerned with the matter of the source of certain company revenue, and the order of the commission here under review undertakes to provide and prescribe the sources of company revenue to pay the levy of Ogden City, and other municipalities similarly enacting franchise or license taxes.

STATEMENT OF POINTS

POINT I.

THE ORDER OF THE COMMISSION IS WITH-
IN THE COMMISSION'S JURISDICTION, POW-
ER AND AUTHORITY.

POINT II.

THERE IS EVIDENCE TO SUPPORT THE MATERIAL FINDINGS OF SEC. 9, OF THE COMMISSION'S REPORT AND FINDINGS OF FACT.

POINT III.

THE ORDER OF THE COMMISSION DOES NOT IMPAIR THE OBLIGATIONS IMPOSED BY OGDEN CITY'S FRANCHISE ORDINANCE.

POINT IV.

THE ORDER OF THE COMMISSION DOES NOT ATTEMPT TO EXERCISE SUPERVISORY POWER OVER, NOR INTERFERE WITH MUNICIPAL MONEY AND PROPERTY.

POINT V.

THE ORDER OF THE COMMISSION DOES NOT UNLAWFULLY ATTEMPT TO EXERCISE POWER TO SUPERVISE AND INTERFERE WITH MUNICIPAL MONEY AND PROPERTY; NOR DOES IT CONSTITUTE AN EXERCISE OF THE TAXING POWER.

ARGUMENT

There is apparently only one issue in this case and that is whether or not just and reasonable practices require that the company construct its rates so that, so far as practicable, money to discharge municipal levies shall be collected from its customers on a state-wide system basis.

POINT I.

THE ORDER OF THE COMMISSION IS WITH-
IN THE COMMISSION'S JURISDICTION, POW-
ER AND AUTHORITY.

Since this same contention has been raised by Ogden City in a similar case involving an order of the commission to the same effect as the order herein attacked and an appeal to this court (In re The Mountain States Tel. & Tel. Co., I. & S. Docket No. 83, May 5, 1952, appeal case No. 7884) wherein the problem was thoroughly aired and authorities cited; it is believed unnecessary to duplicate the full review of authorities cited therein.

However, Section 54-4-1, and Section 54-4-4, U. C. A. 1953, gives the commission general jurisdiction over this subject. Also, in the case of Mountain States Tel. & Tel. Co. v. Public Service Commission, et al., 155 P. (2d) 184, 107 U. 502 (1945) the court said:

“The determination that rates charged are unjust, unreasonable, or confiscatory is not a judicial function, but a legislative function to be exercised by Public Service Commission as an arm of the legislature.”

Certainly it cannot be successfully contended that the statutes governing the Public Service Commission do not plainly bring within its jurisdiction the type of problem sought to be solved by the commission's order herein attacked.

The commission is under a statutory duty (Sec. 54-3-1, U. C. A. 1953) to see that all charges made by a public

utility "shall be just and reasonable"; and that is exactly what the commission has sought to do in its order.

It is to be noted that the so-called franchise ordinance of Ogden City does not attempt to specify where the money should come from with which the company is to pay the sums required by its terms. It merely says that the company shall pay it. The company gets its money by establishing rates to be paid by its customers and the rates to be charged by the company are under the control and within the jurisdiction of the commission.

It must be concluded that the order of the commission is within its jurisdiction, power and authority.

POINT II.

THERE IS EVIDENCE TO SUPPORT THE MATERIAL FINDINGS OF SEC. 9, OF THE COMMISSION'S REPORT AND FINDINGS OF FACT.

Under this point it would seem advisable to point up the well known distinction between evidentiary facts and ultimate facts. An ultimate fact is in the nature of a conclusion based upon other facts which are called evidentiary or primary facts. In this case we find the primary or evidentiary facts to be that the plaintiff (plus some 26 other municipalities) have imposed franchise taxes upon the defendant company measured by the gross receipts of the company from business within the municipality. The money to pay for this levy is contributed by the company's customers in unincorporated areas and in municipalities which

do not have such a tax, and, I suppose in municipalities which have a similar tax to the extent that plaintiff's levy exceeds the levy of that municipality. From these primary or evidentiary facts are to be drawn the ultimate fact or facts.

In this case the commission has drawn from the evidentiary facts set forth above the conclusion or ultimate fact that the practice of the company in collecting this franchise tax from all users systemwide is an unreasonable and unjust rate practice by the company.

Under Section 54-3-8, U. C. A. 1953, the commission is given the "power to determine any question of fact arising under this section," namely, when is there an unjust and unreasonable discrimination between rate payers in different localities?

The views of the Supreme Court of Washington in the case of *State v. Department of Public Service*, 142 P (2d) 489, at page 535, refers to this same problem and uses the following language:

"as stated above, the basis upon which excise taxes have been levied by the cities vary greatly, ranging from four per cent of the gross income to one per cent. No one can say how far this variation might be extended. It suggests large possibilities of municipal action. Manifestly there is an element of unjust discrimination in allowing one community to levy and collect from respondent or any public utility engaged in business throughout the state an occupation tax which in turn the utility would collect by a state-wide increase in rates."

In addition it should be kept in mind that prior to the enactment of this franchise tax by Ogden City the company

paid $\frac{3}{4}$ of 1% ; then by the enactment of this ordinance the payment was increased to 2% of the gross receipts. It does not appear that this increased rate coincided with any increased use or privilege to the company. The company merely continues to enjoy the rights and privileges which it has for many, many years. Nor can the extension of time satisfy the concept of consideration because certainly Ogden City did not plan to do without an electric utility, and it is supposed that should Ogden City desire to go into the electric business it can still do so in spite of the franchise ordinance.

The conclusion must be made that the Ogden City Ordinance is plainly a revenue raising tax from which it may be properly concluded that it is manifestly "unjust and unreasonable" to spread the cost of this tax system wide.

POINT III.

THE ORDER OF THE COMMISSION DOES NOT IMPAIR THE OBLIGATIONS IMPOSED BY OGDEN CITY'S FRANCHISE ORDINANCE.

It is to be observed at the outset that the ordinance of Ogden City does not attempt to specify any particular source of the money to pay the charge levied upon the company. The ordinance does not require the company *not* to impose this franchise tax upon the Company's customers in Ogden City.

It would almost appear that Ogden City believed that the company has an independent source of income separate and apart from the users of the electric utility. It would

also appear that Ogden City is claiming a constitutional right to tax residents of other municipalities, in that it claims that its own citizens should be free from the tax levied upon the company.

However, as pointed out in the telephone case, we are concerned in this case with the one issue, namely, what shall be the source of the revenue to the company by which this franchise tax shall be paid? It is considered useless to engage ourselves in the circular argument that the citizens of Ogden are the real parties in interest and therefore are being deprived of the benefit of their "contract"; because the users of the utility are, by the same reasoning, the real parties in interest on the other side, and therefore many of the same people are both the obligors and obligees to this "contract". Thus we arrive at a patently untenable position because you cannot be both free and bound at the same time.

Thus for the sake of sensibility we must return to the analysis that all we are concerned with here is the problem of public utility rates and revenue.

Reference should be made to point III, in the Brief of Defendant, case No. 7884 which is now before this court where this question as raised by plaintiff is thoroughly discussed; and inasmuch as this case is in principle a companion case to that one it is persuasive authority on this question.

When the alleged "contract" does not specify the source of the money with which the company is to pay the levy, how can it possibly be said that the order of the Commission impairs the obligations of that franchise?

POINT IV.

THE ORDER OF THE COMMISSION DOES NOT ATTEMPT TO EXERCISE SUPERVISORY POWER OVER, NOR INTERFERE WITH MUNICIPAL MONEY AND PROPERTY.

Before the order in question was issued, the Company was obligated to pay the City certain taxes and to render certain services. This duty remains completely unimpaired; the City will receive precisely the same money and service, at the same time, at the same rate, and from the same taxpayer as before. The Commission has the undisputed power to regulate and control the rate relationship between the Company and its customers whether these customers live in Ogden City or elsewhere. The Commission's order affects only the relationship between the Company and its customers, and nothing more.

POINT V.

THE ORDER OF THE COMMISSION DOES NOT UNLAWFULLY ATTEMPT TO EXERCISE POWER TO SUPERVISE AND INTERFERE WITH MUNICIPAL MONEY AND PROPERTY; NOR DOES IT CONSTITUTE AN EXERCISE OF THE TAXING POWER.

Plaintiff's Point VI, VII and VIII will be discussed under this Point.

Again at the outset it must be pointed out that the franchise ordinance does not attempt to prescribe the source of the money to pay the 2% levy. Neither does the

order of the Commission herein name Ogden City as a party to whom this order has been issued. How can it be said that the Commission has attempted to interfere with the municipal money and property when the only order issued by the Commission is directed to the Utah Power and Light Company which clearly comes within the scope of the Commission's regulatory power and authority?

Again it must be observed that Ogden City supposes that the Company has some source of income other than its customers. Any rate order of the commission is for the purpose of transferring the obligations of the Company to its customers because to do otherwise would expose the Company to an unconstitutional confiscation of its property.

The city of Ogden is in the odd position of claiming the power (and right) to levy a tax which, of necessity, the major part of which is to be paid by persons outside of its territorial jurisdiction. It would appear that we have here a thinly veiled purpose, on the part of Ogden City, to extend the source of its tax revenues to include those living in the rest of the State.

If weight is to be given to Ogden City's argument under Point VI of its brief, then it would be necessary to hold that none of the money to pay this 2% levy could, under our constitution, be apportioned to residents of Ogden City, but would have to be obtained from electric users outside of Ogden City. To announce the proposition is to confirm its absurdity.

It would appear that when plaintiff cites and quotes from *State vs. Dept. of Public Service*, 142 P. 498, 535, in

its points VII and VIII, a sufficient answer is given to the arguments advanced by Ogden City thereunder. Does it make a serious difference, if indeed the Commission's order creates a difference, whether the levy of the city is passed on to the Company's customers as a separate item or as "special exchange rates * * * which will in effect require the rate payers in each community to absorb a sum equal to the amount of the tax?" In this phase of the problem it would appear that we are faced with a distinction without a difference. Certainly it does not change the substantive effect of "passing on" the levy by merely changing the method of billing. What Ogden City really means is that its residents should not be required to pay this 2% levy no matter what it is called.

CONCLUSION

The issues raised in this case are substantially the same as, and will be controlled by the decision of the court in, case No. 7884 now being considered by this court, and the court's attention is drawn to that case.

Our conclusion is the same as our beginning, namely, that this case is directly and necessarily concerned with the source of certain company revenue with which to pay municipal levies in the nature of franchise or license taxes. It is necessarily concluded that "just and reasonable" practices do not require that these revenues come from a system wide source, and it was proper for the commission to conclude that the practice of so obtaining these revenues constitutes an "unjust and unreasonable" discrimination in

rates as against those living outside of the taxing municipalities.

Therefore the order of the commission is reasonable and valid and should be affirmed.

Respectfully submitted,

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